**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090



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**U.S. Citizenship and Immigration Services**

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 23 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the petition, the petitioner was a doctoral student at the University of Maryland, College Park (UMCP), as well as a researcher at the U.S. Department of Agriculture's Beltsville (Maryland) Agricultural Research Center (BARC). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on September 15, 2006. In a personal statement accompanying the initial filing of the petition, the petitioner described her work studying "the relationship between thermotolerance and the amount of heat shock protein in hot pepper" at Dankook University in South Korea, and then researching soybeans at the ARC. The petitioner's soybean projects have included genetic research to identify genes that would maximize the benefit of nitrogen fertilization; locating "the

key gene which regulates the expression of beany taste in the soybean seed"; and working on the development of single nucleotide polymorphism (SNP) markers for mapping the soybean genome.

Five witness letters accompanied the petitioner's initial submission. [redacted], "co-advisor in the [petitioner's] PhD dissertation," stated that the petitioner "has developed new DNA markers in a large collection of soybean accessions gathered from all across Asia" and "is applying a new marker system that targets specific positions of the soybean genome for developing DNA markers associated with high protein content." [redacted] asserted that the petitioner's "application of genetic association analysis to soybean genetics promises to open a new way to discover genes for the improvement of this major U.S. crop."

[redacted] asserted that the petitioner's "approach to soybean genetics is novel and innovative and requires a very profound knowledge of molecular genetics combined with a thorough understanding of soybean genetics and physiology." stated:

> [The petitioner] is uniquely qualified to conduct the research leading to the discovery of the genes responsible for protein production in soybeans. This is vital scientific information that, despite significant research efforts, has yet to be obtained. Her research uses a new and highly sophisticated technique to uncover the basic genetics of soybean protein production. The research methods that she will refine will then be used to identify and study the genes associated with soybean oil production. This will provide the critical scientific information to improve protein and oil content in soybeans and also to address[] the enormous problem of the negative association between oil and protein. Soybeans are valuable for both oil and protein but currently high protein soybeans contain low oil content and high oil soybeans contain low protein content. Through understanding the genetics of oil and protein production, which is the eventual goal of [the petitioner's] research, it should be possible for the first time to breed soybean seed with high protein, oil, and yield. Based on the current literature, her research should result in a significant breakthrough for U.S. soybean production.

[redacted], who has "worked in the same laboratory [as the petitioner] for the past three years," stated that the petitioner's "current work involves finding ways to make soybean a more competitive commodity worldwide." [redacted] explains that United States-grown soybeans produce less protein and oil than those grown in some other nations. The petitioner "is currently working on finding genes that contribute to increasing protein in soybean."

[redacted], Research Leader at BARC's Soybean Genomics and Improvement Laboratory and an Adjunct Professor at UMCP, stated that the petitioner 'has developed a project to discover SNPs associated with genes that control the level of protein in soybean seed," and "is developing a procedure to apply so-called 'genetic association analysis' to discover genes that control the level of protein in soybean seeds."

[redacted], collaborator, [redacted] of the University of Nebraska, Lincoln, stated:

> [The petitioner] devised a system whereby the DNA adjacent to genes was evaluated in the ongoing search for SNP DNA markers. This work resulted in the discovery of many new SNP markers in soybean. The markers she discovered were quite useful to Perry and I [*sic*] relative to our collaborative efforts in developing a more marker-dense "genetic linkage map" of the soybean genome. She was thus a "key cog" in a collaborative research team that has produced a soybean linkage map now used by many public and private researchers in the U.S. (and elsewhere) for genetic studies and for the breeding of superior soybean varieties.

The petitioner submitted copies of four articles she had co-authored, published between 2001 and 2005. As evidence of the impact of this published work, the petitioner submitted printouts from citation databases showing three citations of one article, and one of a second article. The petitioner submitted a copy of one citing article, a self-citing piece by the petitioner's collaborators [redacted] and [redacted]

The petitioner also submitted a copy of a 2006 article from *Food USA*, with the headline "New 'deodorized' soybean to rid soy of 'beany' taste?" Counsel stated that this article amounted to "published material about the alien and her work," and claimed that the petitioner "discovered the key gene which regulates the expression of 'beany' taste in the soybean seed. . . . This new technique is already used by companies in the United States to remove this enzyme from soybean projects." The article itself, however, does not mention the petitioner or any institution where she has worked. Rather, the article refers to a non-genetically modified strain of soybean "developed by the National Agricultural Research Organization in Japan." The article indicates that a less "beany" soybean has been successfully developed "through a conventional breeding program" rather than through genetic research of the type conducted by the petitioner. Nothing in the record corroborates counsel's claim that the petitioner deserves credit for the new soybean strain described in the *Food USA* article. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On February 26, 2008, the director issued a request for evidence, instructing the petitioner to submit further evidence of the impact of her work, including updated citation figures. In response, counsel referred back to the petitioner's initial submission, and counsel repeated the claim that the *Food USA* article, which clearly described a non-genetically modified soybean strain bred in Japan, was a report on the petitioner's efforts in Korea and Maryland to genetically modify soybeans.

Three new letters accompanied the appeal. provided updated information relating to the petitioner's most recent work, following the filing of the petition. 8 C.F.R. § 103.2(b)(1) requires the petitioner to establish that she was eligible at the time of filing. Her later work demonstrates that she continues to work in the same field, but it cannot retroactively show that she was already eligible before she did that work.

[redacted] discussed the commercial importance of improving American soybean crops, and stated that the beneficiary "has been doing a major part of this research."

[redacted] of the University of Illinois at Urbana-Champaign asserted that the petitioner's "work in [redacted] laboratory . . . has made a significant contribution to the development of SNP DNA markers for soybean. . . . [T]he use of these markers in my research program is increasing my rate of research progress."

The director denied the petition on July 3, 2008. In the decision, the director acknowledged the intrinsic merit and national scope of the petitioner's occupation, and stated that the petitioner is likely to make positive contributions in her field. The director also found, however, that the petitioner had produced minimal evidence of the impact and influence of her work outside of the laboratories where she has worked. The director found that the witness letters submitted by the petitioner are not sufficient to establish that impact and influence.

On appeal, counsel argues that the director

> misread and misinterpreted what [the petitioner's witnesses] are trying to say. Looking at the letters as a whole it is clear that these people were not downplaying the accomplishments already made by [the petitioner]. They were simply commenting on the fact that [the petitioner's] ongoing research would ALSO lead to additional important findings.

(Counsel's emphasis.) The director, in denying the petition, did not focus at length on the specific content of the witness letters. Broadly, it is more significant that all of these witnesses have collaborated directly with the petitioner or with her mentors; in describing the petitioner's projects, they describe their own projects. These letters are valuable because they illustrate the petitioner's specific role within a given project, but they cannot be first-hand evidence of the wider impact or influence of the petitioner's work.

Counsel stated that the prestige of the journals and conferences where the petitioner's work has appeared "shows, independently, the importance of her work" (counsel's emphasis). We have already cited case law to the effect that counsel's assertions do not have the weight of evidence. The AAO does not share counsel's opinion that the appearance of an article in a given journal, or a presentation at a given conference, is evidence on its face of the importance, influence or impact of that article or presentation. It is true that some venues are more selective than others in terms of what they will publish or present, but it does not and cannot follow that an article that appears in a prestigious journal is influential the moment it appears in that journal – even before the publication's subscribers have had a chance to read and react to it.

Counsel asserted that "certain tools developed by [the petitioner] are still used by researchers in the field (there is really no way this evidence can [have] been shown other than letters from people in the field who use these tools.)." If the letters are all from the petitioner's collaborators and their

associates, then such letters show the petitioner's influence only within that circle. Also, it is not true that letters are the only way to show adoption of the petitioner's methods. A researcher who used the petitioner's methods could say as much in a published report of his or her own research. Indeed, the research ethic of citing one's sources seems to demand such credit.

Counsel, on appeal, once again cites the *Food USA* article, but counsel has never identified any verifiable link between that story and the petitioner's work. We are under no obligation to conclude that the petitioner, working in genetics laboratories in Korea and Maryland, deserves significant credit for the work of Japanese agriculturalists who bred a particular soybean strain without the use of genetic engineering. It is worth noting that the witness letters – on which counsel has elsewhere placed such emphasis – never mention this Japanese soybean strain as an example of the petitioner's work. The *Food USA* article identifies researchers from the University of Georgia, but the record contains no evidence from them (letters or otherwise) to show that they are even aware of the petitioner's work, let alone that they consider her responsible for the soybean strain in question.

It may well be that the petitioner has performed important work, the impact of which will grow more apparent over time. We cannot, however, base our findings on speculation and hypothetical predictions. We must rely on the information and evidence presented in the record. The record, as it now stands, does not support counsel's sometimes hyperbolic claims. If further developments bear out the witnesses' optimistic predictions, we see nothing to prevent the petitioner from filing a new petition, but the petition under consideration here appears to have been filed prematurely at best.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.